NELBRO PACKING CO.

IBLA 81-790 Decided April 8, 1982

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting right-of-way application A-060591.

Reversed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Act of February 15, 1901--Rights-of Way:
Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Pending applications for rights-of-way filed under the Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), shall be considered as applications under the Federal Land Policy and Management Act of 1976.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Act of February 15, 1901--Rights-of-Way:
Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Approval of a domestic water pipeline right-of-way application filed under the Act of Feb. 15, 1901, is within the discretion of the Secretary of the Interior. Approval of such an application remains a discretionary matter under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976). Neither an application for a right-of-way nor the building of a pipeline on public land without prior authorization earns an applicant a right to a right-of-way under these statutes.

3. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Act of February 15, 1901--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A decision rejecting an application for a water pipeline right-of-way will ordinarily be affirmed when the record shows the decision to be a reasoned analysis of the factors involved made in due regard for the public interest, and no sufficient reason to disturb the decision is shown. Where the Bureau of Land Management denies a right-of-way application because of the imminent conveyance of the land sought to a Native corporation which opposes the right-of-way and the record satisfactorily rebuts the substance of the opposition and identifies overriding public interest considerations such that the sole reason for the denial becomes the imminence of the conveyance and concern that the Native corporation control its own land, the BLM decision must be reversed. The problem of a Native corporation's control of the use of land conveyed to it is provided for in section 14(g) of the Alaska Native Claims Settlement Act and 43 CFR 2650.4-3 and should be addressed apart from the grant or denial of a right-of-way on its own merits.

APPEARANCES: E. Michele Moquin, Esq., Seattle, Washington, and Edward G. Burton, Esq., Anchorage, Alaska, for appellant; David C. Crosby, Esq., Seattle, Washington, for intervenor; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Alaska Region, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Nelbro Packing Company has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 18, 1981, rejecting its right-of-way application, A-060591, for a water pipeline crossing land in sec. 2, T. 17 S., R. 47 W., Seward meridian, which has been approved for conveyance to Paug-Vik, Inc., Ltd., a Native corporation organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), for the Village of Naknek.

On May 15, 1980, BLM issued a decision approving certain lands including those at issue herein for conveyance to Paug-Vik without reserving the right-of-way sought by Nelbro and without issuing a decision rejecting Nelbro's longstanding right-of-way application. Nelbro then appealed to the Alaska Native Claims Appeal Board (ANCAB) arguing that BLM is required to render a formal decision on right-of-way application A-060591 and urging that ANCAB direct BLM to grant the right-of-way. ANCAB, by decision styled Nelbro Packing Co., 5 ANCAB 174 (1981), directed BLM to issue a decision on the right-of-way application but declined to rule on the substantive issue of whether Nelbro is entitled to the right-of-way grant because that issue falls within the jurisdiction of the Interior Board of Land Appeals. BLM thereafter issued the decision appealed herein. Paug-Vik has entered an appearance as intervenor.

The history of Nelbro's right-of-way application and of the lands involved is important to an understanding of the arguments on appeal.

Nelbro, which operates a fish processing facility in Naknek, originally used the Allen Nelson Pump Lake as its primary water source and transported the water to its cannery over a right-of-way issued by the Federal government in 1956. 1/ As Nelbro's water needs increased, this source became inadequate and, on December 24, 1963, Nelbro filed application A-060591 for a right-of-way for another water pipeline which would extend from the existing Nelbro right-of-way to Monsen Lake, a larger lake in the area. At about the same time, Nelbro actually laid a pipeline to Monsen Lake and has been using the lake as its main water source ever since.

The pipeline and lands at issue in the right-of-way application extend west to east from Monsen Lake across lots 22 and 23 of sec. 2 and approximately 50 feet beyond to the east where it meets the other right-of-way. The lands in lot 22 were patented in 1964 to a private party for residential purposes. Nelbro obtained an easement from the patentee in 1963 for its pipeline. Lot 23 is subject to a State selection tentatively approved by BLM in 1969. Following the tentative approval, the State of Alaska granted a state patent for lot 23 to Bristol Bay Borough for a school site. Nelbro has obtained an easement across lot 23 from the Borough for its pipeline. 2/ The

1/ The May 15, 1980, decision designating the lands for conveyance to Paug-Vik expressly preserved Nelbro's rights to this right-of-way, A-031271.

2/ The BLM decision indicates that lot 23 has been patented. Nelbro contends that although lot 23 was approved for patent to the State of Alaska no patent from the Federal Government has ever issued. Examination of the most recent status plat, dated June 29, 1981, and included

remaining 50 feet of the subject right-of-way and pipeline cross lands approved for conveyance to Paug-Vik.

Following receipt of Nelbro's application in 1963, BLM notified Nelbro that the application was deficient as to a statement indicating the right-of-way, if approved, would be subject to applicable Department regulations. Nelbro resubmitted its application on March 5, 1964, with this addition.

On December 26, 1966, an engineering firm employed by Nelbro inquired as to the status of the right-of-way application. BLM responded by letter dated January 6, 1967, that the application was "awaiting an appraisal," that lot 22 had been patented in 1964, and that "[w]e hope to be able to grant the right-of-way soon."

On April 12, 1967, various Native associations filed Native Protest AA-872 opposing further disposal of land in their area without their consent.

In November 1967 the BLM Land Office requested that the district manager do an appraisal for the Nelbro right-of-way.

Nelbro again inquired as to the status of its application in February and March of 1968 and offered its cooperation to get the application approved. On March 28, 1968, BLM advised that the application was still waiting for the rental appraisal and advised that Nelbro needed to submit evidence of water rights as required by 43 CFR 2234.1-2(d)(2) (1968). Nelbro submitted the necessary documents on May 8, 1968.

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fn. 2 (continued)
in the case file, reveals a reference to the State of Alaska's selection (A-067435) but no patent number. Nevertheless, the status of lot 23 was addressed in State of Alaska, 19 IBLA 178 (1975), wherein this Board held:

"Where the State of Alaska had received tentative approval of a land selection and had granted a patent to a third party in accordance with § 6(g) of the Alaska Statehood Act, and where the state patent was granted before the enactment of the Alaska Native Claims Settlement Act, with the express approval of the various native groups then concerned, a native village may not later select those lands pursuant to the Alaska Native Claims Settlement Act, as a valid third party right to the land had already been created."

Bristol Bay Borough's rights to lot 23 are thus paramount. Nelbro's easement agreement with Bristol Bay Borough, dated May 18, 1981, permits Nelbro to construct and maintain an underground water pipeline.

In October 1968 Nelbro again requested the status of its application. BLM informed Nelbro that its requested right-of-way was subject to Native Protest AA-872 and that BLM would not be able to grant the right-of-way until the protest was resolved or a release obtained from the Native associations. BLM added that it would attempt to secure such a release after it received the field report and appraisal for the right-of-way but Nelbro could also attempt to secure the release if it wished to expedite matters.

On January 3, 1969, Nelbro's attorney wrote to the Native associations requesting a release.

On January 8, 1969, BLM notified Nelbro that the Bureau of Indian Affairs had applied for a withdrawal of all unreserved lands in Alaska (33 FR 18591 (Dec. 14, 1968)) to protect Native Aleut, Eskimo, and Indian rights and that, as a result, "all final actions, such as granting a right-of-way * * * must be suspended until final action is taken on the withdrawal." The formal withdrawal was ordered by the Secretary of the Interior on January 17, 1969 (Public Land Order No. 4582, 34 FR 1025 (Jan. 22, 1969)). The order withdrew all unreserved public lands in Alaska through December 31, 1970. All applications pending before the Department were suspended until April 2, 1971. During the intervening period, January 1, 1971, to April 2, 1971, the State of Alaska was given a preferred right of selection.

By letter dated January 28, 1969, attorneys for the Native associations advised Nelbro that under the Secretarial order they could no longer supply the requested release.

The Alaska Native Claims Settlement Act (ANCSA) was enacted, effective December 18, 1971, to provide for a fair and just settlement of all claims by Natives and Native groups of Alaska based on aboriginal land claims. 43 U.S.C. § 1601 (1976). The Act nullified Native Protest AA-872, withdrew various lands, including those in sec. 2, T. 17 S., R. 47 W., Seward meridian, and made them available for selection by Native villages. 43 U.S.C. §§ 1610, 1611 (1976).

In March 1976 an engineering firm again inquired on behalf of Nelbro as to the status of right-of-way application A-060591 and what action was necessary to get the right-of-way grant.

In May BLM advised that the enactment of ANCSA had canceled Native Protest AA-872 but that a portion of the lands had been withdrawn and then selected by village selection application AA-6680-A for the Village of Naknek and the remaining lands were either patented to private individuals or tentatively approved to the State of Alaska. BLM added that before any further action could be taken on Nelbro's application, Nelbro was required by 43 CFR 2650.1(a) (1975) to obtain comments from Paug-Vik and submit them to BLM.

On January 24, 1977, Paug-Vik submitted its views in opposition to granting the right-of-way to Nelbro. Paug-Vik asserted aboriginal rights to the land involved and claimed that Nelbro's appropriation of water from Monsen Lake caused a decline in the water level which adversely affects the scenic and recreational value of the lake and threatens destruction of black fish spawning grounds.

In August of 1977 BLM made a field examination of the affected lands.

The State of Alaska Department of Natural Resources approved a water appropriation permit for Nelbro late in 1977.

On March 9, 1978, the Anchorage District Manager, BLM, concurred in the field report issued February 16 for application A-060591, which recommended that the right-of-way be granted subject to certain terms and conditions. The field examiner had concluded:

> The subject lands have been used by Nelbro for many years to transport water from Monsen Lake to their cannery. Although Nelbro did not have legal authority to do this, their actions were prompted by the fact that Allen Nelson Pump Lake proved to be inadequate for their needs. In order to keep the cannery operating at full capacity, it was determined necessary to tap the water sources at Monsen Lake.
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> The operation of the cannery is economically important to both the local and the State economy. The company pays a substantial amount of money out in the form of taxes, licenses, fees and payroll to workers and fishermen. Over half of those on the payroll are residents of Alaska and many are from the immediate Naknek area itself.
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> Paug-Vik, Inc. strongly opposes the right-of-way and the appropriation of water from Monsen Lake. Their objections are based on the claimed environmental impacts caused by the draw-down on the lake and they also question the State's authority to adjudicate water rights on native lands. The appropriation of water from Monsen Lake has affected the lake's resource values but the resulting impacts have been negligible (see EAR). The issue concerning the State's authority to adjudicate water rights on native lands is very important to the State of Alaska. That State has issued a decision, to grant a permit to Nelbro for the appropriation of water from Monsen Lake. This permit will give Nelbro the right to appropriate water until the subject right-of-way case is resolved, and if

> the case is resolved in Nelbro's favor, then a certificate of appropriation will be issued to the company.
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> Evidence was submitted at the fact-finding hearing on October 14, 1977, concerning the appropriation of water from Monsen Lake that Paug-Vik at one time proposed to sell water to canneries in the area. Nelbro has indicated they will not buy water from Paug-Vik nor do they wish to purchase the right-of-way from Paug-Vik.
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> There are no existing land use conflicts concerning the proposed right-of-way. It appears that the present use of the subject land is the highest and best use.

No action was taken on this recommendation.

Thereafter, BLM issued its May 15, 1980, decision, approving lands for conveyance to Paug-Vik without reserving the right-of-way sought by Nelbro, who then appealed the matter to ANCAB.

The BLM decision issued in response to the ANCAB remand and now on appeal notes a longstanding Departmental and BLM policy in Alaska not to grant rights-of-way over lands selected by Native corporations when a Native corporation has expressed less than favorable views on the matter, unless sufficient public need is shown by the applicant. BLM found no overriding public need in Nelbro's case to overcome the objections of Paug-Vik, particularly since the conveyance to Paug-Vik is imminent. BLM suggests that it would be in the best interests of Paug-Vik to make its own decisions on the use of its land rather than the Federal Government. The BLM decision held specifically:

> In keeping with the ANCSA Declaration of Policy and implementing regulations in 43 CFR 2650, that portion of right-of-way application A-060591 as it affects those lands described in the BLM decision dated May 15, 1980, approving conveyance of the subject lands applied for in village selection AA-6680 to Paug-Vik Incorporated, is hereby rejected. In addition, all lands encompassing the remaining portion of the applied for right-of-way have been patented. Since BLM does not have the authority to issue rights-of-way on patented lands, right-of-way application A-060591 as to those lands is also rejected. Consequently, right-of-way application A-060591 is rejected in its entirety.

In its statement of reasons, Nelbro makes two principal arguments. First, Nelbro urges that BLM's representations that the right-of-way would be granted and BLM's delay in rendering a decision estop

BLM from rejecting application A-060591. Second, Nelbro asserts that proper exercise of BLM's discretion compels grant of the requested right-of-way.

In support of its estoppel argument, Nelbro recites the 18-year history of the processing of the application indicating that at no time until the May 18, 1981, decision was any mention of a possible denial made and pointing particularly to those instances where BLM referred to a probable approval or expressly recommended approval of the application. Nelbro asserts that, although it had met all of the application requirements, BLM unreasonably and unfairly delayed in ordering the field appraisal to the point approximately 4 years after its submission. Nelbro asserts that over the entire period it has continued to maintain its access to and reliance upon Monsen Lake as it primary water source pending BLM's expected grant of the right-of-way. Nelbro argues that in addition to the expense of preserving its water appropriation rights and continued operation of its facility, its case meets the other elements of the estoppel test set out in United States v. Georgia-Pacific, 421 F.2d 92 (9th Cir. 1970). First, Nelbro argues, BLM certainly was aware of its representations that Nelbro could expect approval and that Nelbro was relying on Monsen Lake as its primary water source. Second, Nelbro has reasonably acted in reliance on BLM's representations. Third, Nelbro, was ignorant of the "fact" that BLM would deny its application.

To support its second principal argument, Nelbro argues that once it had complied with all of the application requirements as requested by BLM and BLM had accepted its submissions, BLM's discretion in the matter was exhausted and BLM was bound to grant the application. Nelbro also asserts that BLM has abandoned its reasoned and appropriate exercise of discretion, reflected in the field report recommendation, by deferring to the "less than favorable views" of Paug-Vik and has made those views determinative.

In response BLM argues that the mere filing of an application by Nelbro created no valid existing rights which would be protected from conveyance of the land to Paug-Vik as the statute, 43 U.S.C. § 959 (1976), authorized, rather than directed, the Secretary to permit the use of rights-of-way. Thus, the grant of a right-of-way is totally discretionary. Further, BLM notes that it was bound by Departmental regulation to seek and consider the views of the village corporation. See 43 CFR 2650.1. BLM concludes that it considered the favorable field recommendation and the opposition of Paug-Vik, as well as Departmental policy, and then exercised its discretion to reject the application.

In reply to Nelbro's statement of reasons, Paug-Vik argues that nothing in the record supports the invocation of estoppel for Nelbro's benefit. Paug-Vik states that Nelbro cannot point to any damaging reversal of position by BLM or affirmative misconduct which was relied

on to Nelbro's detriment. Paug-Vik asserts that any perceived assurances that the right-of-way would be granted would have been dispelled by information about the Native protest. Paug-Vik notes that evidence of water rights was a legal condition to consideration of Nelbro's application and the expense of obtaining the water rights did not result from detrimental reliance.

Paug-Vik also challenges Nelbro's assertions that BLM exhausted its exercise of discretion before the May 1981 decision and that the decision was an abuse of discretion. Paug-Vik argues that the field report and favorable recommendations were internal matters and the exercise of discretion for the purpose of formal decision did not occur until the May 1981 decision. Paug-Vik urges that ANCSA requires that special consideration be given to Native concerns and that there is no abuse of discretion evident when BLM weighs those concerns against the absence of any compelling public need for the right-of-way despite the favorable field report. Furthermore, Paug-Vik claims that Secretarial Order No. 2987 (41 FR 11331 (Mar. 18, 1976)) states that, as a matter of policy, the Department will not reserve easements over Native lands for private for-profit purposes.

[1] Appellant's right-of-way application was filed under the Act of February 15, 1901, 43 U.S.C. § 959 (1970). 3/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. Rights-of-way on public lands are now covered by Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1976), which authorizes the Secretary of the Interior to grant rights-of-way for appellant's purposes. Section 510(a), 43 U.S.C. § 1770(a) (1976), states that any pending right-of-way application shall be considered an application under FLPMA. New England Fish Co., 42 IBLA 200 (1979) (appeal pending). See Donald R. Clark, 39 IBLA 182 (1979); Full Circle, Inc., 35 IBLA

3/ The Act of Feb. 15, 1901, as amended, 43 U.S.C. § 959 (1970), reads in relevant part:

"The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, * * * for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses * * * provided * * * That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

325, 85 I.D. 207 (1978); Stanley S. Leach, 35 IBLA 53 (1978). Departmental regulations governing rights-of-way under FLPMA are found in 43 CFR Part 2800. 4/

[2] Before turning to Nelbro's arguments, we must state initially that approval of a water pipeline right-of-way application was within the discretion of the Secretary of the Interior under the Act of February 15, 1901, supra, and remains a wholly discretionary matter under FLPMA. Neither the filing of the application by Nelbro in 1963 nor the building of a pipeline and continued use of it without prior authorization earned Nelbro any right to a right-of-way under these statutes. New England Fish Co., supra; Stanley S. Leach, supra; Jack M. Vaughan, 25 IBLA 303 (1976). No rights vest in the applicant until the grant is approved by the Secretary. United States ex rel. Sierra Land and Water Co. v. Ickes, 84 F.2d 228, 231 (D.C. Cir. 1936), cert. denied, 299 U.S. 562; Continental Telephone of California, 34 IBLA 374 (1978); Zelph S. Calder, 16 IBLA 27, 81 I.D. 339 (1974).

[3] A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision to be a reasoned analysis of the factors involved made in due regard for the public interest and no overriding reason to disturb the decision is shown. Stanley S. Leach, supra; Jack M. Vaughan, supra.

Contrary to Nelbro's assertions in this appeal, BLM's discretion to act on its right-of-way application was not exhausted by Nelbro's compliance with the application requirements. Rather such compliance was a condition precedent to BLM's exercising its discretion to approve or reject the application. As BLM suggests, the decision being challenged herein involves an evaluation of various factors: Nelbro's application, the field report, and the public interest among others. In addition, Departmental regulations require that the objections and rights of Paug-Vik be considered. 43 CFR 2650.1(a)(2); 43 CFR 2800.0-2(d).

During this Board's review of this appeal, we requested the Alaska State Office, BLM, to identify and document the "long-standing Departmental and Bureau of Land Management policy" alluded to in its decision. In response BLM identified Instruction Memorandum AK-76-237, dated November 9, 1976, and signed by the Alaska State Director, concerning interim management practices for lands withdrawn by ANCSA such as those at issue. Although the memorandum expired by its own terms on

4/ Regulations governing application A-060591 at the time of its submission were found in 43 CFR Part 244 (1963). These regulations were reorganized in March 1964 as 43 CFR Subpart 2234 (1964) and revised and reorganized in June 1970 into 43 CFR Parts 2800 and 2870 (1971).

December 31, 1977, before the decision on appeal was issued, BLM has informed the Board that it is still used by the Alaska State Office and reflects the State Director's current policy.

Instruction Memorandum AK-76-237 incorporates a memorandum from the Director, BLM, to the Alaska State Director, issued December 29, 1972, following passage of ANCSA, which initially set guidelines for the interim administration of lands withdrawn pursuant to ANCSA. The 1972 guidelines provided in part:

> I. General
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> A. The general objective for interim administration is to avoid encumbrances and impacts on the land which might jeopardize (1) interests of the Native beneficiaries, or (2) the future commitment of the land to permanent Federal management. However, encumbrances may be allowed if they are necessary for the general welfare of the people of Alaska and in the general public interest.
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> B. Assure that the action is in the public interest. If the use is for other than public purposes, call on the applicant for written justification of the need for such use. Identify alternative sources for the resources involved, and see whether they can be substituted for the applied for sources.
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> C. The time period and volume of resource material involved in the proposed lease or permit should be kept to a minimum consistent with the need to be served. The duration of the permit or lease should be related to the possibility of selection or contemplated transfer of management. Stockpiling and construction of major improvements should be avoided for terminable permits or leases.
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> * * * * * * *
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> II. Specifics for Native Withdrawn Areas
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> A. Where a permit or use application includes land withdrawn for Native selection, the views of the concerned village or region will be obtained for your consideration. Notify the Native entity of the decision made.
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> * * * * * * *
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> C. The strategic location and proposed use of the land should be evaluated to assure that no permitted use

would have a detrimental effect on Native long-term interest, including protection of cemetery or historical places, and future economic development.

Instruction Memorandum AK-76-237 added:

> Until advised otherwise, we will process other less than fee applications (lineal rights of way, * * *) as we have been doing. * * * [T]he Director's December 29, 1972 memo * * * is still valid. Specific comments, applicable to new applications and renewals, keyed to the numbering in the Director's memo, are as follows:
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> I. C. Except where statute or regulation (ours or those of another agency) requires otherwise (airports, highways), permits and renewals thereof will normally be issued for one year periods. Some discretion may be used but we do not want to be administering a lot of permits on nonfederal land or go through cancellation paperwork when the matter could be cleared up by normal termination action.
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> II. A. Native corporation views, not consent, will be obtained except on former reserves where consent is required (43 CFR 2650.1 (a)(2)). Views or consent, in writing, must be secured by the applicant from the corporation having selected the affected land. If a village selection is involved, the applicant should keep the region advised. * * *
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> * * * * * * *
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> If the applicant is unable to obtain written views or consent, efforts to obtain them must be thoroughly documented and forwarded to the official with whom the application or renewal request was originally filed. In such cases, or if the corporation is opposed to the application, the casefile and supporting documentation will be forwarded to the [State Director]. * * * Supporting evidence must include a report by the [District Manager] on the items in II. C., a summary of land status, a thorough discussion by the applicant as to why and how the public interest and benefit is involved and what alternatives are available, and the recommendations of the issuing officer. A final decision will be made personally by the [State Director or Associate State Director].

Departmental regulations reconfirm that the Secretary could continue to issue leases, permits and rights-of-way on land withdrawn for selection by Native corporations but require that the views of concerned

regions and villages "shall be obtained and considered." 43 CFR 2650.1(a). BLM has reported that where Native views are unfavorable its consistent practice has been that a report is sent to the State Director for a decision as to whether there is a public interest in granting a right-of-way or other encumbrance sufficient to outweigh Native objections.

Although this was not a new application or renewal, BLM followed the above procedures in the Nelbro case. The appropriate report was submitted to the Alaska State Director. Discussions considering the application were had with both the national and regional solicitor's offices. The State Director concluded that "there was no overriding public need sufficient for the Federal government to grant the right-of-way, especially when the conveyance to [Paug-Vik] is delayed only by the pending Nelbro application" and that "it is in the best interests of [Paug-Vik], because the conveyance is imminent, that it, rather than the Federal government, be the entity to make the decision on the use of its lands." Accordingly, he directed that the application be rejected.

Based on a thorough examination of the record before us, we conclude that the imminence of the conveyance to Paug-Vik does not outweigh the public interest considerations on record in the grant of this right-of-way. It is clear from the guidelines presented and the regulations that the views of an affected Native corporation must be considered as one factor in the decision herein but that they are in no way controlling. The field report and environmental assessment prepared by BLM for Nelbro's right-of-way rebut convincingly Paug-Vik's substantive arguments against grant of this 50-foot right-of-way and identify the public interest involved. Thus we are left with the BLM State Director's conclusion that because the conveyance to Paug-Vik is imminent, Paug-Vik should make the decision as to the use of the conveyed land. We find this rationale to be particularly inappropriate in view of the history of the application 5/ and an abrogation of BLM's decisionmaking responsibilities.

5/ We firmly adhere to the principle often expressed in Board decisions that a delay in the adjudication of an application by the Department cannot create rights contrary to law. Simon A. Rife, 56 IBLA 378 (1981); New England Fish Co., supra; Roberta Thompson, 38 IBLA 333 (1978); Guy W. Franson, 30 IBLA 123 (1977); 43 CFR 1810.3. See also Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977). We note that for a significant portion of the time period since the filing of Nelbro's application BLM could not act on Nelbro's application because of the 1969 land withdrawal initially and subsequent passage of ANCSA which continued the withdrawal of the lands at issue. We feel strongly, however, that denying the application because conveyance to Paug-Vik is now imminent is no more legitimate reason for doing so than granting the application because of delay.

Section 22 of ANCSA, 43 U.S.C. § 1621 (1976), provides expressly, and Departmental regulation 43 CFR 2650.1(a) reiterates, that the authority of the Secretary to grant rights-of-way in Alaska was not impaired by the land withdrawals for Native selection purposes specified in ANCSA. The District Court for Alaska, in Cape Fox Corp. v. United States, 456 F. Supp. 784, 801 (1978), found that Congress did not intend to give Native corporations a right to control selected land prior to conveyance. That, in effect, is what BLM has done here where the immediacy of the conveyance is the seemingly sole reason for denial of Nelbro's right-of-way application.

Furthermore, we find that ANCSA and the Department's regulations specifically provide a means of dealing with the problem of Native control over selected lands after conveyance. Consistent with section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976), 43 CFR 2650.4-3 states that encumbrances to these lands granted prior to a Native conveyance

> shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way, or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease, contract, right-of-way or easement, or waive any right or benefit belonging to the grantee until he has notified the grantee and allowed him an opportunity to present his views.

Further comment is necessary in response to Paug-Vik's assertion that Secretarial Order No. 2987 controls the disposition of this case. This Board recognizes that where an action is compelled by a Secretarial order it is without jurisdiction to alter the effect of the order and is limited to a review of the case to determine whether the order was properly applied and implemented. Texas Oil & Gas Corp., 46 IBLA 50 (1980). The Board is not bound, however, by policy formulated by the State Director, BLM, or a decision made by or for him.

Paug-Vik points to section 4(5) of the order which states:

> 5. Privately owned energy, fuel, and natural resources that are being developed for a profit should not be afforded extraordinary privileges across private property. Therefore, easements should not be reserved by the United States in conveyances to Alaska Natives for the

benefit of such privately owned energy, fuel, and natural resources;

When this paragraph is read in isolation from the rest of the order, arguably it would appear to control the situation before us. However, the purpose of Secretarial Order No. 2987 was to establish a policy for reserving easements for transportation of energy, fuel, and natural resources in Alaska for the use of the United States pursuant to section 17(b) of ANCSA. Paragraph 4 of section 4 makes it clear that the order is directed to the preservation of the United States ability to develop, transport, and deliver federally owned energy, fuel, and natural resources without unreasonable expense or delay, using routes under Federal control after the land involved is conveyed out of Federal ownership. 6/ Paragraph 5 only serves to make the distinction that the purpose of these easements is not to protect similar privileges for privately developed energy, fuel, and natural resources.

Examination of section 17(b) of ANCSA and the corresponding regulations 43 CFR 2650.4-7 also reveals clearly that 17(b) easements are public easements created at the time of conveyance of the land to the Natives. This is in distinct contrast to the preservation of prior existing rights arising from leases, contracts, permits, rights-of-way, or easements granted by the United States to another party prior to the Native conveyances. See 43 U.S.C. § 1621 (1976); 43 CFR 2650.4-1 through 2650.4-3. A right-of-way such as the one sought by Nelbro would be preserved by ANCSA as a valid existing right. See e.g., Alaska Native Claims Selection, AA-6680-B and AA-6680-C, 47 FR 10646 (Mar. 11, 1982). Secretarial Order No. 2987 has no applicability to Nelbro's right-of-way application.

6/ Section 4 of Secretarial Order No. 2987 reads in part:

"Section 4. Determination of the Non-local Easements Which Are Necessary for Public Use. Pursuant to the authority vested in the Secretary of the Interior under section 17(b) of the ANCSA, the following determinations have been made concerning nonlocal easements which are necessary for public use:

"1. There is a national need to expedite the transportation of energy, fuel, and natural resources in order to meet the national energy crisis;

"2. The routes of such transportation should be precisely and carefully planned;

"3. The number of options or alternatives available as possible routes should be maximized in order to preserve optimum choices;

"4. Federally owned energy, fuel, and natural resources should be developed, transported, and delivered without unreasonable expense or delay to the Federal Government along routes that are under Federal control in order that environmental protection and public safety can be maintained."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is reversed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge